Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

TROY KING,
Attorney General for the State of Alabama,
in his official capacity, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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September 25, 2007

CAPITAL CASE
EXECUTION DATE: SEPTEMBER 27, 2007

QUESTIONS PRESENTED

1. Whether the "strong equitable presumption" against the entry of a stay is applicable to a § 1983 complaint brought by a death-sentenced inmate seeking DNA testing, where (i) the complaint was filed before the conclusion of federal habeas review and before the state moved to set an execution date; (ii) the inmate has been deprived of the tools necessary to demonstrate innocence, including the opportunity to litigate the merits of his claims before *any* state or federal post-conviction court; (iii) the relevant Supreme Court precedent involved lawsuits filed only days before scheduled executions; (iv) the uncertainty regarding the applicability and scope of such precedent in the context of lethal injection cases has resulted in the application of disparate measures of timeliness for § 1983 actions by the Courts of Appeal; and (v) DNA testing cases implicate the uniquely grave concern that the state may execute an innocent person.

2. If the "strong equitable presumption" against the entry of a stay is applicable, whether the Eleventh Circuit correctly applied this standard in affirming the dismissal of Mr. Arthur's complaint, where the court (i) created an irrebuttable presumption that would have barred any review on the merits of Mr. Arthur's DNA claims even if he had been entitled to such review; (ii) failed to recognize the potentially exculpatory force of DNA testing, which could confirm the previous testimony of the prosecution's star witness that a burglar—not Mr.

Arthur—had committed the murder and could identify the real perpetrator; and (iii) based its finding of "unreasonable delay" on certain factors beyond Mr. Arthur's control, including the amount of time it took for the courts to adjudicate his habeas petition before dismissing it as untimely, and the unavailability of advanced DNA technology during his trial.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Mr. Arthur's Trial and Conviction 2

B. Federal Post-Conviction Proceedings and Mr. Arthur's Efforts to Obtain Access to Physical Evidence for DNA Testing 7

C. Proceedings Below 9

D. Jurisdiction Below 12

REASONS FOR GRANTING THE PETITION 12

I. The Court Should Grant Certiorari to Clarify Under What Circumstances a "Strong Equitable Presumption" Is Applicable to a Death-Sentenced Inmate's Section 1983 Action. 14

TABLE OF CONTENTS
(continued)

Page

II. The Court Should Grant Certiorari to Clarify That Application of a "Strong Equitable Presumption" to a Death-Sentenced Inmate's Section 1983 Action Requires a Careful Inquiry into the Facts and Equities of the Case.....20

A. Mr. Arthur Has Demonstrated a Likelihood of Success on the Merits. 22

B. Mr. Arthur Did Not Unreasonably Delay in Bringing His § 1983 Complaint. 28

C. The Court Failed to Consider the Critical Issue of the Public Interest. 30

CONCLUSION 32

Memorandum Opinion and Order of the District Court for the Middle District of Alabama, dated August 17, 2007 ..... A1

Opinion and Order of the District Court for the Middle District of Alabama, dated August 30, 2007 ..... A35

Opinion of the Court of Appeals for the Eleventh Circuit, dated September 21, 2007 ..... A42

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Beardslee v. *Woodford*,
395 F.3d 1064 (9th Cir. 2005) 19

Bell Atlantic Corp. v. *Twombly*,
127 S. Ct. 1955 (2007) 10-11

Brady v. *Maryland*,
373 U.S. 83 (1963) 10

Cooey v. *Strickland*,
479 F.3d 412 (6th Cir. 2007) 19

Ford v. *Wainwright*,
477 U.S. 399 (1986)..... 20

Gomez v. *United States Dist. Court for the N. Dist. of Cal.*,
503 U.S. 653 (1992)..... 15

Grayson v. *Allen*,
491 F.3d 1318, 1325 (11th Cir. 2007)..... 18

Harvey v. *Horan*,
285 F.3d 298 (4th Cir. 2002) 12

Hill v. *McDonough*,
126 S. Ct. 2096 (2006) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Winship,
397 U.S. 358 (1970)..... 31

Mathews v. *Eldridge*,
424 U.S. 319 (1976)..... 10

Nelson v. *Campbell*,
541 U.S. 637 (2004)..... *passim*

Nooner v. *Norris*,
491 F.3d 804 (8th Cir. 2007) 18

Reese v. *Livingston*,
453 F.3d 289, 291 (5th Cir. 2006) 18

Schlup v. *Delo*,
513 U.S. 298 (1995)..... 30-31

Solesbee v. *Balkcom*,
339 U.S. 9 (1950) 20

Yarris v. *County of Delaware*,
465 F.3d 129 (3d Cir. 2006)..... 28

STATE CASES

Commonwealth v. *Rosier*,
685 N.E.2d 739 (1997) 23

Wicker v. *Alabama*,
433 So. 2d 1190 (Ala. Crim. App. 1983)..... 3-4

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES AND RULES

U.S. Const. amend. XIV, § 1 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 12

28 U.S.C. § 1331 12

28 U.S.C. § 1343 12

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 12 10-11

STATE STATUTES

Ala. Code § 36-18-20 (2007) 24

Ala. Code § 36-18-22 (2007) 24

Ala. Code § 36-18-24 (2007) 24

OTHER AUTHORITY

13 James Wm. Moore *et al.*,
Moore's Federal Practice
§ 65.22 (3d ed. 2007) 21-22

PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas D. Arthur, an indigent inmate sentenced to be executed on September 27, 2007, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit dated September 21, 2007, affirming the judgments of the United States District Court for the Middle District of Alabama, dated August 17, 2007, and August 30, 2007.[1] Mr. Arthur also respectfully requests that the Court stay Mr. Arthur's execution so that he is not put to death before the claims set forth herein receive full consideration.

OPINIONS BELOW

The August 17, 2007 Memorandum Opinion and Order of the United States District Court for the Middle District of Alabama dismissing Mr. Arthur's Complaint brought pursuant to 42 U.S.C. § 1983 ("Complaint") appears in the Appendix to this Petition at A1. The August 30, 2007 Opinion and Order denying Mr. Arthur's motion to amend or alter the dismissal order appears in the Appendix to this Petition at A35.

The September 21, 2007 decision of the Eleventh Circuit affirming the District Court's

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[1] Mr. Arthur is not proceeding *in forma pauperis* because pro bono counsel have volunteered to pay the filing fee on his behalf.

dismissal appears in the Appendix to this Petition at A42.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued its decision on September 21, 2007. This Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of [State law], subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Mr. Arthur's Trial and Conviction

On the morning of February 1, 1982, the police responded to a call at the Wicker residence in Muscle Shoals, Alabama, where they found Judy Wicker

lying on the floor with blood on her face and her sister Teresa Rowland kneeling beside her. (T.R. 310-11, 322, 337-42)[2] The police found Troy Wicker's body in the bedroom with a gunshot wound to the right eye. (T.R. 318-20)

The police collected physical evidence from the crime scene, including Judy Wicker's blood-stained clothing and torn undergarment (T.R. 365–66), vacuum sweepings, hairs (T.R. 368), shell casings (T.R. 363–64), and a pillowcase with gunpowder flakes (T.R. 367). The police also dusted the area for latent fingerprints. (T.R. 368) The police located Judy Wicker's 1981 Buick Riviera, which had been abandoned in a parking lot; the police searched it and found a wig, hairs, and latent fingerprints. (T.R. 370–71) The murder weapon was never recovered. (T.R. 352) The hairs and fingerprints found at the crime scene and in the Buick Riviera were tested but they did not match Mr. Arthur's.

After the shooting, Judy Wicker was taken to the hospital and remained there for several days. (T.R. 776) She suffered "a bruise around her left eye, a laceration of her left upper lip, two chipped teeth

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[2] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third trial.

and an abrasion on her left hip." *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192–93 (Ala. Crim. App. 1983). Moreover, on the same day as the murder, a rape kit was prepared and seminal fluid collected. (Exs. 2 and 3 to Complaint)

In response to questioning by investigators at the hospital, Judy Wicker provided the following account of the crime: She returned home after dropping her children off at school. *Wicker*, 433 So. 2d at 1194. When she entered her house, she found an African-American man burglarizing her home. *Id.* at 1192, 1194. The burglar raped her, knocked her unconscious, and then shot Troy Wicker. Consistent with this account, Officer Lanny Coan corroborated that shortly after he arrived at the crime scene, Judy Wicker told him that she had been raped by an African-American man. *Id.* at 1192.

Judy Wicker was eventually charged with her husband's murder under the theory that she killed him to collect approximately $90,000 in life insurance proceeds. (T.R. 831) At her trial in 1982, she testified under penalty of perjury to the same version of events that she had related to the investigators. *Wicker*, 433 So. 2d at 1192–94. Despite her claims of innocence, Judy Wicker was convicted of murdering her husband and was sentenced to life imprisonment. (T.R. 794–95)

At Mr. Arthur's trial in 1991, Judy Wicker gave a completely different account of the murder. (T.R. 787) Although she previously had sworn under

oath that a burglar had murdered her husband, she now claimed that she, along with Teresa Rowland and her sister's boyfriend, Theron McKinney, had decided to kill Troy Wicker, and that she had paid Mr. Arthur to pull the trigger. (T.R. 776, 781, 800) She also paid Rowland $6,000 and gave McKinney jewelry and a Trans Am in exchange for their assistance in carrying out the murder. (T.R. 780) The State of Alabama, however, never prosecuted Rowland or McKinney.

At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. In return for her testimony, the state prosecutor, Gary Alverson, promised to make a parole recommendation on her behalf. (T.R. 823–26, 830–31) Prior to becoming a state prosecutor, Alverson had represented Judy Wicker and assisted her in procuring a deal from the then-prosecutor in exchange for her testimony. (T.R. 825–27) Thus, the State's prosecutor offered his former client a deal: assist in the prosecution of Mr. Arthur and obtain early parole. Judy Wicker was released after serving only about ten years of her life sentence.

The circumstantial evidence introduced at Mr. Arthur's trial to support Judy Wicker's story was weak. Officer Lang testified that he observed Judy Wicker driving past a school crossing twice prior to 8 a.m. (T.R. 306, 308–09) This testimony just as credibly supported her initial story that an unknown intruder assaulted her in her home and killed her

husband. Pat Halliday testified regarding Mr. Arthur's possession of a large amount of money after the murder, but this testimony was also consistent with evidence that Mr. Arthur had won money in a poker game. (T.R. 543, 882–83) Debra Philips testified merely that Mr. Arthur threw a garbage bag into the Tennessee River. (T.R. 632–34)

Patricia Yarbrough Green, a convicted felon, testified that Mr. Arthur stopped by Cher's Lounge between 2 p.m. and 4:30 p.m. on the day before the murder, and asked her to purchase .22 mini mag long rifle bullets. (T.R. 562) Green further testified that she asked Terry Lewis to purchase these bullets from Woolco and he did so between 3 p.m. and 4 p.m., and that she gave these bullets to Mr. Arthur while he was still at Cher's Lounge. (T.R. 562, 575) According to Green, Mr. Arthur told her that the bullets would be used to kill someone in Tennessee. (T.R. 566) Troy Wicker, however, was killed in Alabama. Moreover, Lewis testified at Mr. Arthur's first and second trials that he gave the bullets to Green around 6 p.m. or 6:15 p.m.[3]—not between 3 p.m. and 4 p.m. as Green had testified. Indeed, Lewis' testimony demonstrates that there was no way that Green could have given Mr. Arthur the bullets before he left Cher's Lounge around 4:30 p.m.

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[3] (Trial transcript from 1983 trial at 1240; trial transcript from 1987 trial at 574-75) Terry Lewis did not testify at Mr. Arthur's third trial.

During Mr. Arthur's three-day trial, he was permitted to represent himself. As he explained to the trial court, Mr. Arthur's decision was the result of his intense frustration with his counsel's failure to communicate with him and to prepare adequately for trial. The court, however, did not hold a hearing or engage in a colloquy to determine whether Mr. Arthur's decision was knowing and voluntary prior to granting his request to represent himself.

On December 5, 1991, Mr. Arthur was convicted of capital murder for the 1982 killing of Troy Wicker. On the same day, the penalty phase that followed lasted less than an hour and a half. Mr. Arthur's counsel conducted no independent investigation and offered no mitigation testimony. The jury recommended the death penalty by a vote of 11–1.

B. Federal Post-Conviction Proceedings and Mr. Arthur's Efforts to Obtain Access to Physical Evidence for DNA Testing

Mr. Arthur's conviction and sentence were affirmed on direct appeal in 1998. Notwithstanding his diligent efforts, Mr. Arthur was unable to find counsel or other means of access to the courts for either state or federal collateral proceedings before both statutes of limitations had run. In order to overcome this procedural bar, Mr. Arthur—with the assistance of pro bono counsel he finally succeeded in locating—diligently tried to develop facts relating to

his gateway claim of actual innocence and his tolling claims.

As set forth in his Complaint, Mr. Arthur has diligently tried to obtain access to critical pieces of physical evidence for purposes of DNA testing. Mr. Arthur filed a motion for access to trial exhibits in the Circuit Court of Jefferson County, Alabama, but the state court declined to rule on the motion and instead transferred the exhibits to the federal district court, which denied Mr. Arthur's motion on April 30, 2002.

On June 3, 2002, in connection with federal habeas proceedings, Mr. Arthur requested discovery relating to actual innocence, and sought to conduct DNA testing for the first time on physical evidence, including a rape kit and blood-stained clothing.[4] The district court denied Mr. Arthur's request for DNA testing, rejected his tolling claims, and dismissed his first and only habeas petition as time-barred on December 4, 2002. On December 17, 2002, Mr. Arthur filed a motion to alter or amend the judgment

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[4] Mr. Arthur also sent letters to Defendants or their predecessors in office, as well as to other potential custodians of evidence, in an effort to locate the evidence and request that it be preserved. The letters asked the recipient to search available records to confirm whether the recipient is in possession of the evidence, and if so, to preserve the evidence. (Exs. 6–27 to Complaint)

in the district court, which was denied on June 4, 2003.

On October 6, 2003, Mr. Arthur filed his appellant's brief in the Eleventh Circuit Court of Appeals, challenging the dismissal of his habeas petition and the denial of his motion for leave to conduct discovery. The State of Alabama filed its brief on December 23, 2003, followed by Mr. Arthur's filing of his reply brief on January 23, 2004. On June 21, 2006, the Eleventh Circuit affirmed the district court's opinion in its entirety. On July 11, 2006, Mr. Arthur filed a petition for rehearing and rehearing en banc, which was denied on August 14, 2006.

On January 11, 2007, Mr. Arthur filed a petition for certiorari with the United States Supreme Court, which was denied on April 16, 2007. Accordingly, Mr. Arthur stands to be executed without ever having received *any* post-conviction review—state or federal—on the merits of his claims.

C. Proceedings Below

Before the conclusion of federal habeas review and before the State of Alabama moved to set an execution date, on April 12, 2007, Mr. Arthur filed this action pursuant to 42 U.S.C. § 1983 seeking to conduct DNA testing on critical pieces of physical evidence, including a rape kit, blood-stained clothing, and hairs. Mr. Arthur proposed to pay for such testing so that the State would incur no expense.

On April 17, 2007, the State of Alabama moved to set an execution date for Mr. Arthur. The Alabama Supreme Court granted the State's motion on June 22, 2007, and set an execution date of September 27, 2007.

On May 7, 2007, one of the defendants moved for a 14-day extension of time in which to file a motion to dismiss, which the District Court granted. On May 18, 2007, all defendants moved to dismiss the Complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure on various grounds, arguing, among other things, that there is no constitutional right to DNA testing under the Fourteenth Amendment's guarantee of due process as construed in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). On June 18, 2007, Mr. Arthur filed a Memorandum in Opposition to the State's motion, and the State's reply brief was filed on July 2, 2007.

In an order dated August 17, 2007, the District Court granted the State's motion to dismiss. (A1) The District Court did not address whether Mr. Arthur had adequately pled that the DNA testing he sought would bear out his longstanding claims of innocence and allow him finally to present his meritorious constitutional claims to a court. Rather than applying the standard of review appropriate on a Rule 12 motion—whereby the court declines to dismiss as long as the allegations "raise a right to relief above the speculative level . . . on the

assumption that all of the allegations in the complaint are true," *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citation omitted)—the District Court applied the "strong equitable presumption" against granting relief that a court would apply in evaluating a request for a stay of execution, and determined that it should not entertain Mr. Arthur's claims. (A34) The District Court applied this standard on the purported grounds that Mr. Arthur's request for access to evidence for DNA testing could not be litigated without entry of a stay of execution, and that this Court has recognized federal courts' "equitable powers to dismiss § 1983 suits they saw as speculative or filed too late in the day." (A12 (internal punctuation and citation omitted))

On August 27, 2007, Mr. Arthur timely moved the District Court to alter or amend its judgment of dismissal, which the District Court denied on August 30, 2007. (A35)

On September 12, 2007, Mr. Arthur appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit on various grounds, including that (1) the district court erred in applying a "strong equitable presumption" against granting relief; (2) the District Court erred in concluding that Mr. Arthur had not demonstrated a likelihood of success on the merits; and (3) the District Court erred in concluding that Mr. Arthur unreasonably

delayed in asserting his claims. Mr. Arthur also moved the Eleventh Circuit for a stay of execution.

On September 21, 2007, the Eleventh Circuit affirmed in their entirety the District Court's August 17 and August 30 decisions. (A58) The Eleventh Circuit agreed with the District Court that Mr. Arthur's Complaint could not be litigated without entry of a stay, and that dismissal was appropriate because Mr. Arthur failed to rebut the "strong equitable presumption against the grant of the stay." (A55) Like the District Court, the Eleventh Circuit did not reach the merits of Mr. Arthur's Complaint.

D. Jurisdiction Below

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Jurisdiction in the Eleventh Circuit was proper under 28 U.S.C. § 1291 because Mr. Arthur appealed from the District Court's final judgment and denial of injunctive relief.

REASONS FOR GRANTING THE PETITION

As many jurists have come to recognize, the contours of the right to DNA testing as a means of demonstrating actual innocence is "one of the most important criminal law issues of our day." *Harvey* v. *Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc).

Nonetheless, many courts continue to approach claims for DNA testing with skepticism. Such skepticism is rarely directed any longer at the soundness of the science involved, or its ability to match physical evidence to a specific individual (or to rule out such matches) with an extraordinary degree of accuracy. Indeed, the reliability and legitimacy of the technology used for testing has been amply demonstrated; DNA testing is now used by all fifty states and the federal government as a key law enforcement tool. Rather, courts have looked askance at such claims when they are brought by death-sentenced inmates seeking to demonstrate their innocence—particularly when they are brought at the eleventh hour, with an execution date looming—on the assumption that the claims are a tactic used to delay an execution.

Some courts have responded to such cases by adopting a standard applying a "strong equitable presumption" that would bar the claim if it is brought too late to litigate fully without the entry of a stay of execution. Whatever wisdom there may be to such a standard, there are significant problems with its application, both generally and in Mr. Arthur's case. *First*, courts have applied this Court's teaching as to the contours and applicability of this presumption in widely divergent and contradictory ways. *Second*, courts applying the "strong equitable presumption" have frequently failed to inquire into the unique circumstances and

equities of the case in order to determine whether the presumption is rebutted. This is what happened in Mr. Arthur's case. *Third*, to the extent that a death-sentenced inmate seeking DNA testing must show a likelihood of success on the merits of his claim, there is a lack of clarity as to the required showing. The guidance of this Court is necessary on these critical questions that bear on matters of life and death.

I. The Court Should Grant Certiorari to Clarify Under What Circumstances a "Strong Equitable Presumption" Is Applicable to a Death-Sentenced Inmate's Section 1983 Action.

In *Hill* v. *McDonough*, 126 S. Ct. 2096, 2102 (2006), this Court held that death-sentenced inmates could use 42 U.S.C. § 1983 as a vehicle to challenge the method by which the State proposed to execute them. In so holding, it answered a question left open in its decision in *Nelson* v. *Campbell*, 541 U.S. 637 (2004). In *Nelson*, the Court recognized the availability of § 1983 to inmates seeking to challenge certain execution procedures on Eighth Amendment grounds. In *Hill*, the Court reaffirmed an important limitation on § 1983 litigation by death-sentenced inmates first set forth in *Nelson*: "a strong equitable presumption against the grant of a stay" of execution exists "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," *Hill*, 126 S. Ct. at

2104; *Nelson*, 541 U.S. at 650, and courts could use that presumption to dismiss cases that were filed at the "last minute." *Hill*, 126 S. Ct. at 2104 (citing *Gomez* v. *United States Dist. Court for the N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)); *Nelson*, 541 U.S. at 649 (quoting *Gomez*, 503 U.S. at 654). Hill and Nelson filed their complaints, respectively, four days and three days before their scheduled executions. Thus, *Hill* and *Nelson* identified the "State's strong interest in proceeding with its judgment" and potential manipulative or dilatory motives on the part of the plaintiff as reasons to dismiss such cases. *Hill*, 126 S. Ct. at 2104; *Nelson*, 541 U.S. at 649-50. *Hill* and *Nelson*, however, did not address the critical question presented here: whether the "strong equitable presumption" applies to a § 1983 action seeking DNA testing that was filed *before* an execution became imminent.

In affirming the dismissal of Mr. Arthur's Complaint, the Eleventh Circuit cited the "strong equitable presumption" of *Hill* and *Nelson*. (A50) The district court found "no logical or precedential reason to treat a § 1983 request for injunctive relief for purposes of DNA or other testing any differently than a § 1983 challenge to the method of execution" (A12 n.5), and the Eleventh Circuit agreed. In so doing, the courts below have become the first to apply the "strong equitable presumption" in a DNA access case. DNA access cases, however, implicate concerns that are not present in method-of-execution

cases, paramount among which is the real possibility that the relief sought could prevent the state from executing an innocent person.[5] Under the circumstances of Mr. Arthur's case, the Eleventh Circuit erred in applying *Hill* and *Nelson* to bar Mr. Arthur from litigating the merits of his DNA claims.

Instead of inquiring into the merits of Mr. Arthur's Complaint, the appellate court merely concluded that Mr. Arthur had failed to overcome the "strong equitable presumption" against the entry of a stay. (A52–A55) It did so although (1) Mr. Arthur brought his § 1983 action before the conclusion of federal habeas review and before the State had even moved for an execution date to be set; and (2) Mr. Arthur had not sought a stay, and at the time he filed his Complaint, Mr. Arthur had no basis to believe that a stay would be necessary to litigate his claim. The Eleventh Circuit misinterpreted and improperly extended this Court's precedent into contexts that this Court did not contemplate.

Both *Hill* and *Nelson* involved § 1983 actions that had been commenced within days of a scheduled execution. Mr. Arthur, by contrast, filed his Complaint when no execution date had been set. The execution date that was later set fell more than

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[5] Fifteen people exonerated through the results of DNA testing spent time on death row. *See* The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (last visited Sept. 24, 2007).

five months after the date on which Mr. Arthur had commenced his action. Because *Hill* and *Nelson* both involved demonstrably "last-minute" applications for relief, *Hill*, 126 S. Ct. at 2104; *Nelson*, 541 U.S. at 649, these cases provide insufficient guidance on what facts justify a court's application of the "strong equitable presumption." How many days before a scheduled execution date must a complaint be filed in order to be considered "last-minute" so as to trigger the presumption? How many years after the plaintiff's conviction becomes final? How many weeks or months after plaintiff's habeas proceedings conclude? By what standard does a court determine whether an action cannot be fully litigated without the entry of a stay?[6] At what point in the litigation must the need for an entry of a stay be evident in order for the presumption to apply? What factors constitute a "speculative" or "dilatory" action, *Hill*, 126 S. Ct. at 2104, and to the extent that "dilatoriness" requires evidence of a plaintiff's state of mind, what evidence suffices?

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[6] The Eleventh Circuit supported its conclusion that Mr. Arthur could not fully litigate his claims without entry of a stay by citing the time it took another plaintiff with a factually and procedurally dissimilar case to litigate his action seeking DNA testing. (A53) Such a comparison disregards the inquiry into the equities involved in the case at bar that the *Nelson* court prescribed. 541 U.S. at 649-50.

Because *Hill* and *Nelson* left lower courts to their own devices in determining how and under what circumstances to apply the "strong equitable presumption" standard in the context of lethal injection cases, it is not surprising that the Courts of Appeal have applied disparate standards in determining when a § 1983 complaint is filed "too late in the day," resulting in inconsistent application of this Court's precedents. The Eleventh Circuit is alone in applying the "strong equitable presumption" to dismiss both lethal injection *and* DNA § 1983 claims if the death-sentenced plaintiff "unreasonably delayed" in bringing them and if such claims cannot, in the trial court's view, be fully litigated without entry of a stay. (A58); *Grayson* v. *Allen*, 491 F.3d 1318, 1325 (11th Cir. 2007). However, even in lethal injection cases, courts have not uniformly applied *Hill* and *Nelson*.

For example, consistent with the Eleventh Circuit, the Fifth and Eighth Circuits have applied a "strong equitable presumption" against the grant of a stay. *See Reese* v. *Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) ("a plaintiff cannot wait until a stay must be granted to enable [him] to develop facts and take the case to trial"); *Nooner* v. *Norris*, 491 F.3d 804, 809 (8th Cir. 2007) (proper inquiry "is whether [the plaintiff] could have brought his claim at such a time as to allow consideration of the merits without requiring entry of a stay") (internal quotation marks omitted).

In contrast, the Ninth Circuit has rejected the majority approach to the presumption, holding that courts should carry out a fact-specific inquiry "to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Beardslee* v. *Woodford*, 395 F.3d 1064, 1070 (9th Cir. 2005) (per curiam) (where plaintiff filed § 1983 complaint one month before his scheduled execution, district court erred in "applying a general rule that a claim was dilatory if first filed at the time when the possibility of execution became imminent"). Instead of applying any equitable standard, the Sixth Circuit has adopted a statute-of-limitations rule to determine the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct review of his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 421–22 (6th Cir. 2007).

To prevent the execution of a potentially innocent man who has been deprived of the critical tools necessary to demonstrate his innocence, this Court should grant Mr. Arthur's petition for certiorari in order to clarify (1) whether the "strong equitable presumption" applies to actions brought by death-sentenced inmates pursuant to § 1983 seeking access to physical evidence for DNA testing, and (2) the standards courts must use to determine whether the presumption applies in a particular case.

II. The Court Should Grant Certiorari to Clarify That Application of a "Strong Equitable Presumption" to a Death-Sentenced Inmate's Section 1983 Action Requires a Careful Inquiry into the Facts and Equities of the Case.

"[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Ford* v. *Wainwright*, 477 U.S. 399, 414 (1986) (quoting *Solesbee* v. *Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)). Implicit in the fundamental due process imperative is the requirement that the courthouse doors not be barred to a person subject to such a "life-and-death guess" merely because the claim he presses would require ancillary relief from the court if the merits of the claim are to be addressed. Mr. Arthur, like other death-sentenced inmates seeking access to evidence for DNA testing that could exculpate them, ultimately seeks to make the guess as informed as humanly possible. The court below applied the "strong equitable presumption" in such a way as to preclude that effort.

In affirming the dismissal of Mr. Arthur's Complaint, the Eleventh Circuit found timing dispositive:

> Although the equitable considerations in each case are naturally different, even if Arthur would have been entitled to a decision on the merits without the entry of a stay, the strong presumption against a stay operates against him.

(A55 (internal quotation marks omitted)) The Eleventh Circuit has therefore determined the "strong" presumption to be irrebuttable where the court has decided—based on no identified criteria—that a stay would have been necessary in order to litigate the case. Nothing in *Hill* or *Nelson* compels such a result.

This Court has indicated that courts applying the "strong equitable presumption" must, in addition to deciding whether the plaintiff has unreasonably delayed, determine whether the plaintiff meets the requirements for a preliminary injunction. *Hill*, 126 S. Ct. at 2104. Assuming *arguendo* that the "strong equitable presumption" applies to complaints such as Mr. Arthur's that seek DNA testing, this Court should grant certiorari to clarify that courts adjudicating such complaints must undertake the inquiry into the equities called for in deciding a preliminary injunction application. The equitable factors considered in such a decision include (1) the movant's likelihood of success on the merits; (2) the likelihood that movant will suffer irreparable injury if the request for preliminary injunction is denied; (3) the balance of hardships between the parties and

coupled against hardship faced by non-parties; and (4) the effect of a grant or denial of preliminary injunctive relief on public policy. *See* 13 James Wm. Moore *et al.*, Moore's Federal Practice § 65.22 (3d ed. 2007).

The Eleventh Circuit affirmed the dismissal of Mr. Arthur's action based on a cursory inquiry that ignored certain key factors entirely and made erroneous factual determinations as to others. Most critically, the court below erred in finding that Mr. had failed to show a likelihood of success on the merits.

A. Mr. Arthur Has Demonstrated a Likelihood of Success on the Merits.

The courts below concluded that Mr. Arthur could not show a likelihood of success on the merits of his claim because the federal habeas court already ruled that the physical evidence Mr. Arthur sought—and still seeks—"will not clearly exonerate him." (A54) While the evidence that Mr. Arthur seeks to subject to DNA testing is the same evidence that the habeas court considered, neither the habeas court nor the courts below grasped the potentially exculpatory force of DNA testing here. As recognized by former U.S. Attorney General John Ashcroft, DNA technology is "the truth machine of law enforcement, ensuring justice by identifying the

guilty and exonerating the innocent."[7] The ability of DNA testing to undermine wholly the confidence in the outcome of Mr. Arthur's trial is not speculative and demonstrates his likelihood of success on the merits.

In connection with its investigation of the murder of Troy Wicker, the State of Alabama collected various pieces of evidence. Mr. Arthur seeks to conduct DNA testing on the following:

Judy Wicker's Rape Kit. A rape kit was prepared when Judy Wicker was taken to the hospital shortly after the police arrived to investigate the murder, and the kit was sent to the State of Alabama's Department of Forensics. The rape kit created on the same day as the murder was never subjected to DNA testing. Indeed, the DNA testing that Mr. Arthur seeks to conduct (Short Tandem Repeat DNA testing) was not even available during his third trial.[8] Although the State of Alabama has argued that exculpatory DNA test results would not prove or disprove Mr. Arthur's guilt because he was not convicted of raping Judy Wicker, this argument ignores the fact that such results could confirm testimony from Judy Wicker's trial that an African-

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[7] News Conference – DNA Initiative, March 4, 2002, http://www.usdoj.gov/archive/ag/speeches/2002/030402newsconferncednainitiative.htm (last visited Sept. 24, 2007).

[8] *See Commonwealth* v. *Rosier*, 812 685 N.E.2d 739, 743 (1997) (noting that Short Tandem Repeat DNA testing was not commercially available until "several years" after 1991).

American man burglarized the Wicker residence, assaulted Judy Wicker, raped her and then shot Troy Wicker.

DNA testing of the rape kit would do much more than merely show that Mr. Arthur did not rape Judy Wicker. Such testing could identify the real perpetrator. The advent of national DNA databanks has allowed law enforcement officials to solve thousands of "cold cases," some of them decades old and with no other leads or suspects until a match in the databank points to the perpetrator. The FBI's Combined DNA Index System ("CODIS") integrates DNA profiles gathered at the state and local levels into a national DNA database.[9] This database contains over 4.7 million convicted offender DNA profiles and over 183,441 DNA profiles from unsolved cases.[10] Each profile consists of a unique set of DNA identification characteristics.

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[9] Alabama passed legislation in 1994 that initiated the creation of a DNA databank that brought the State into the CODIS network. Alabama has collected DNA samples from every person convicted of a felony or other enumerated offenses since May 6, 1994, as well as every person confined on a felony conviction as of May 6, 1994. Ala. Code § 36-18-24 (2007). The express purpose of collecting and maintaining such data is to aid in identifying perpetrators and exonerating the innocent. Ala. Code §§ 36-18-20, 36-18-22 (2007).

[10] *See* CODIS, "National DNA Index System," at http://www.fbi.gov/hq/lab/codis/national.htm (last visited Sept. 24, 2007).

If the results from Judy Wicker's rape kit matched the DNA profile of a convicted felon from the CODIS database, such match would completely undermine confidence in Mr. Arthur's conviction. The circumstantial evidence against Mr. Arthur cannot withstand DNA test results demonstrating that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fits the description of her husband's murderer that she provided during her own trial. Indeed, Short Tandem Repeat DNA testing can conclusively prove innocence by identifying the true perpetrator —even in cases where a mere exclusion could not conclusively prove innocence—by developing a profile that could provide a "cold hit" in the DNA database.[11]

Hairs and a Wig from Judy Wicker's 1981 Buick Riviera. The State recovered hairs and a wig from Judy Wicker's 1981 Buick Riviera and sent them to the State's Department of Forensics for microanalysis. Fingerprints found in the automobile were tested but did not match those of Mr. Arthur. At trial, the State's representative, John Kilbourn, testified that the hair samples were "Negroid hair . . . forcibly removed." Such evidence is

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[11] *See, e.g.*, Fernanda Santos, *DNA Testing Frees Man Imprisoned for Half His Life*, New York Times, Sept. 21, 2006, at B1 (Jeffrey Deskovic); Jim Yardley, *Texas Inmate's Confession Slips Through the Cracks*, New York Times, Oct. 17, 2000, at A20 (Christopher Ochoa and Richard Danziger).

consistent with Judy Wicker's description at her own trial that the perpetrator was African American. DNA testing on such hair could also match the DNA profile of a person fitting this description from the CODIS database. Furthermore, although Judy Wicker testified that Mr. Arthur had disguised himself by wearing a wig (T.R. 759), Kilbourn did not find any hair inside the wig as would be expected if it had been worn. DNA testing of this wig could confirm that Mr. Arthur's DNA was not in the wig.

Judy Wicker's Clothing. The State submitted Judy Wicker's blood-stained clothing and ripped undergarments to the State's Department of Forensics, but these items were not tested for blood typing or DNA. At trial, the prosecution argued that Judy Wicker and Mr. Arthur concocted a story that she had been assaulted by an African-American man who then killed Troy Wicker, but that it was actually Mr. Arthur who had assaulted her and killed her husband. The fact that Judy Wicker's clothing was torn and stained with blood suggests that there was a struggle, and it is highly possible that the perpetrator left traces of DNA in the form of blood or skin cells on Judy Wicker's clothing and on her undergarments during the rape. DNA testing of such items could confirm that Judy Wicker testified truthfully when she stated that a burglar—not Mr. Arthur—assaulted her and killed Troy Wicker.

Den Floor Vacuum Sweepings and Hairs. Vacuum sweepings from the den floor and hairs from a shoe were collected from the Wicker residence and submitted to Kilbourn. These sweepings consisted of numerous hairs and fibers, none of which were matched to Mr. Arthur. Testing the hairs to determine whether they match the other items could further demonstrate that a burglar was present in the Wicker residence on the morning of the murder.

In sum, DNA testing could demonstrate that Judy Wicker was raped by someone with a criminal record whose description is consistent with her testimony from her own trial. In other words, comparing the test results of the rape kit to the CODIS database could result in a match with a known offender convicted of a violent crime, and confirm that Judy Wicker was telling the truth when she testified that this burglar assaulted her and killed Troy Wicker.

Furthermore, DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, and that this person was not Mr. Arthur. Not only can such testing exclude Mr. Arthur, redundant DNA test results—establishing the same genetic profile on multiple pieces of evidence—are critical to establishing the identity of the perpetrator

of the crime.[12] A match to a convicted offender profile of a person who had no reason to be in the Wicker residence on the morning of the murder would confirm that Judy Wicker testified truthfully when she stated that a burglar killed Troy Wicker. Indeed, nowhere in Judy Wicker's testimony did she allow for the possibility that two persons killed Troy Wicker. Thus, DNA testing could provide powerful evidence of Mr. Arthur's innocence by demonstrating that the same person, *i.e.* the real perpetrator, is the source of DNA on multiple pieces of evidence.

For all of these reasons, Mr. Arthur has shown a likelihood of success on the merits of his claim, and the court below erred in concluding that his Complaint was properly dismissed.

B. Mr. Arthur Did Not Unreasonably Delay in Bringing His § 1983 Complaint.

In affirming the District Court's finding that Mr. Arthur unreasonably delayed in filing his Complaint, the Eleventh Circuit noted the number of years that have elapsed since (i) the crime occurred, (ii) Mr. Arthur was convicted, (iii) his direct review

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[12] Redundant DNA test results such as those that may be obtained here have served as the basis for numerous post-conviction DNA exonerations. *See, e.g., Yarris* v. *County of Delaware*, 465 F.3d 129, 132-33 (3d. Cir. 2006) (Nicolas Yarris); Kim North Shine, *DNA Tests Exonerate Man; After Nearly A Decade in Prison, Suspect Is To Be Set Free*, Detroit Free Press, June 12, 2003, at 1B (Kenneth Wyniemko).

had concluded, (iv) his state post-conviction proceedings concluded, and (v) his filing of his federal habeas petition. (A54) Such an attempt to characterize the timing of Mr. Arthur's § 1983 action as "unreasonable delay" on the part of Mr. Arthur is unwarranted.

First, it is inaccurate to state or imply that Mr. Arthur has been able to control the course or pace of his criminal or his post-conviction proceedings. Mr. Arthur cannot be faulted that his first two trials were overturned due to constitutional violations. Nor can he be faulted for the time that it took for his habeas petition to be adjudicated: the Eleventh Circuit decided his appeal of the denial of his petition nearly three years after Mr. Arthur filed his appellant's brief.

Second, the district court's finding of unreasonable delay ignored the fact that other litigation was ongoing. The court criticized Mr. Arthur for not having filed his Complaint while simultaneously litigating a habeas petition, the granting of which would have obviated the need for the instant action. (A33) It was reasonable for Mr. Arthur, in the interest of conserving judicial resources and avoiding multiple lawsuits pursuing the same relief, to wait until such litigation had concluded before commencing the instant action. It would have been more unreasonable, in fact, for Mr. Arthur to have ignored the important interest in

conserving scarce judicial resources and pursued the inefficient course of action proposed by the court.

Third, in stating that Mr. Arthur should have sought access to DNA testing earlier because he "has been able to see [sic] evidence through a § 1983 action for at least five years" (A54), the Eleventh Circuit ignored the fact that DNA testing methods have become both more widely available and more sensitive, precise and accurate in both identifying individuals and eliminating individuals as suspects. Had Mr. Arthur sought DNA testing earlier, the value of the results would likely not have been as great as they would be today.

Fourth, it simply cannot be correct that Mr. Arthur "unreasonably delayed" in seeking relief because a stay would need to be entered in order for the merits of his claims to be adjudicated. (A53) At the time Mr. Arthur filed his Complaint, there was no execution date pending; no need for a stay could even arguably have arisen until the execution date was actually set—more than two months after the action was commenced. Such an *ex post* analysis is both illogical and unfair to Mr. Arthur, as it would be to any litigant who faces such retroactive foreclosure of his claims.

C. The Court Failed to Consider the Critical Issue of the Public Interest.

"The quintessential miscarriage of justice is the execution of a person who is entirely innocent."

Schlup v. *Delo*, 513 U.S. 298, 324-25 (1995). Where the possibility of such outcome is present, as it is here, the public interest is indisputably implicated. It was thus error for the courts below to disregard this equitable factor in determining that the balance of the equities militated for the dismissal of Mr. Arthur's Complaint. Indeed, the very application of the "strong equitable presumption" to defeat the request of a condemned man for evidence that could exonerate him evokes public policy issues, including the public's confidence in the integrity of our justice system. "It is critical that the moral force of the criminal law not be diluted by [procedures] that leave[] people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. 358, 364 (1970). Because the Eleventh Circuit is alone in having extended the "strong equitable presumption" to the context of actions seeking DNA testing, the court's failure to consider the public policy ramifications of its decision was error.

CONCLUSION

For all of the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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